

U.S. SUPREME COURT  
FILED  
MAY 10 1976  
MICHAEL E. CARNEY, JR., CLERK

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IN THE

# Supreme Court of the United States

October Term, 1976

No. 75-1637

ROBERT L. WADE,

*Petitioner,*

v.

WALTER HENKENBERNS,  
MICHAEL CARNEY

and

THE CITY OF CINCINNATI,

*Respondent.*

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF OHIO

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WHITE & GETGEY CO., L.P.A.  
JOHN J. GETGEY, JR.  
615 Provident Tower  
Cincinnati, Ohio 45202  
*Attorney for Petitioner.*

## TABLE OF CONTENTS

	PAGE
OPINIONS BELOW .....	1
JURISDICTION .....	2
QUESTION PRESENTED .....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS .....	2
STATEMENT OF THE CASE .....	3
REASONS TO GRANT CERTIORARI .....	4
CONCLUSION .....	7
APPENDIX A .....	A1
APPENDIX B .....	A2
APPENDIX C .....	A4
APPENDIX D .....	A5
APPENDIX E .....	A9
APPENDIX F .....	A11

## CASES CITED

Ayala v. Philadelphia Board of Public Education 305 A2d 877 (Sup. Ct. Pa. 1973) .....	5
Becker v. Beaudon, 106 R.I. 562, 569-71, 261 A2d 896, 900-01 (1970) .....	5
Campbell v. State of Indiana, 284 N.E.2d 733 (Sup. Ct. Ind. 1972) .....	5, 7
Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A2d 276 (1958) .....	5, 7
Haney v. City of Lexington, 386 S.W. 2d 738 (Ky. 1964) .....	5, 7
Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) .....	5

	PAGE
Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962) .....	6
Kitto v. Minot Park District, 224 N.W. 2d 795 (Sup. Ct. N.D. 1974) .....	5, 7
Merrill v. City of Manchester, 332 A2d 378 (Sup. Ct. N.M. 1974) .....	6
Molitor v. Kaneland Community Unit District No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) .....	6, 7
Muskopf v. Corning Hospital District, 55 C.2d 211, 11 Cal. Rptr. 89 (1961) .....	6, 7
Rice v. Clark County, 382 P.2d 605 (Nev. 1963) ....	6, 7
Spanel v. Mounds View School District No. 621, 118 N.W.2d 795 (Minn. 1962) .....	7
Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963) .....	6, 7
Williams v. City of Detroit, 364 Mich. 231, 111 N.W. 2d 1 (1961) .....	6, 7

#### CONSTITUTION, STATUTES AND RULE

OHIO CONSTITUTION OF 1851, ARTICLE I, Sec. 2 .....	2, 4, 7
OHIO CONSTITUTION OF 1851, ARTICLE I, Sec. 16 .....	3, 5, 6, 7
OHIO CONSTITUTION OF 1802, ARTICLE VIII, Sec. 7 .....	3
U. S. CONSTITUTION, Amend XIV, Sec. 1 .....	3, 6
28 U.S.C. § 1254(1) .....	2

## IN THE Supreme Court of the United States

October Term, 1976

No. \_\_\_\_\_

ROBERT L. WADE,

*Petitioner,*

v.

WALTER HENKENBERNS,

MICHAEL CARNEY

and

THE CITY OF CINCINNATI,

*Respondent.*

#### PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, Robert L. Wade, prays for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

#### OPINIONS BELOW

The judgment of the Supreme Court of Ohio was rendered without an opinion and is unreported. The opinion of the Court of Appeals, First Appellate District of Ohio has not been officially reported. The opinion of the

Court of Common Pleas, Hamilton County, Ohio is unreported. The judgment of the Supreme Court, the Court of Appeals, and the Court of Common Pleas are reproduced in the Appendix at pages 15, 16, 10, 9 respectively.

### JURISDICTION

A Motion for an Order Directing the Court of Appeals for Hamilton County to certify its record was overruled by the Supreme Court of Ohio on February 13, 1976. On the same date the Supreme Court of Ohio entered judgment in favor of defendants.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### QUESTION PRESENTED

Where agents, servants and employees of the City of Cincinnati commit negligence, carelessness and reckless misconduct as a result of which serious injury occurs to an innocent victim, that victim has the right to recover damages against the City of Cincinnati, and such action is not barred by the Doctrine of Governmental Immunity which denies equal protection and benefit of the law to the people of this state in that it is violation of Section 2 and 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

*Additionally, where the Supreme Court of Ohio dismisses such appeal "for the reason that no substantial constitutional question exists herein," despite the existence of substantial constitutional issues, the within cause should be remanded to the Ohio Supreme Court for a hearing on the merits.*

### CONSTITUTIONAL PROVISIONS

Article I, Sec. 2 of the Ohio Constitution of 1851, in pertinent part:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

Article I, Sec. 16 of the Ohio Constitution of 1851, in pertinent part:

"All Courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Article VIII, Sec. 7 of the Ohio Constitution of 1802, in pertinent part:

"That all Courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered, without denial or delay."

Fourteenth Amendment of the United States Constitution in pertinent part:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### STATEMENT OF THE CASE

On July 28, 1972, plaintiff-appellant, Robert L. Wade, filed a Complaint, for money only, in the Court of Common Pleas, Hamilton County, Ohio, the same being Case No. A-725528. Therein it was alleged in substance that the



plaintiff-appellant's left eye was grievously injured and blinded on August 10, 1970, as a result of the negligence and carelessness of agents and employees of defendant-appellee, City of Cincinnati. Subsequently defendant-appellee, City of Cincinnati, filed a Motion to Dismiss it as a party defendant for the reason that defendant, City of Cincinnati, is immune for tort liability in this action by virtue of governmental immunity.

Thereafter, oral argument was heard by the Hamilton County Common Pleas Court on September 16, 1974, at which time the Court found that the Motion to Dismiss of Defendant, City of Cincinnati, was meritorious and should be sustained. Thereafter, an Entry Granting the Defendant, City of Cincinnati, Motion to Dismiss was filed, with exceptions reserved, and plaintiff-appellant timely filed a Notice of Appeal from the Entry Granting the Motion.

This matter was subsequently heard by the Court of Appeals, First Appellate District of Ohio, Case No. C-74560 on appeal by plaintiff-appellant, Robert L. Wade, on the plaintiff-appellant's original pleading whose claim states a cause of action in the State of Ohio. The Court of Appeals in a decision dated October 27, 1975, affirmed the order of the trial court.

On February 13, 1976, a Motion for an Order Directing the Court of Appeals to certify its Record was overruled. On the same date the Supreme Court of Ohio dismissed appellant's appeal, without opinion, on ground that no substantive constitutional question was involved.

## REASONS TO GRANT CERTIORARI

### To Consider Question 1

#### SUMMARY

I. The Doctrine of Governmental Immunity clearly violates Section 2 of Article I of the Ohio Constitution and

the 14th Amendment of the United States Constitution by denying equal protection of the law to the people of the State of Ohio by its grant of special privilege and immunity to municipal corporations.

II. The Doctrine of Governmental Immunity clearly violates Section 16 of Article I of the Ohio Constitution in that said Doctrine closes the courts and denies remedy by due course of law to some, while others who are injured by negligent acts are entitled to seek such legal redress through the courts.

III. The issue raised in this matter is of great general interest because the ancient Doctrine of Governmental Immunity is an anachronism without rational basis.

#### I

The First District Appellate Court of Appeals, held, and the Supreme Court of Ohio affirmed, without opinion, in effect, that equal protection of the law, as pronounced in Article I, Sections 2 and 16 of the Ohio Constitution, and the 14th Amendment of the United States Constitution, is not available to the people of the State of Ohio who are injured by the negligent acts of employees and agents of municipal corporations. The Court below relied heavily, if not solely, on the doctrine of stare decisis to support its decision.

In the past twenty years, there has been an ever growing trend in the United States toward more responsible government and the abrogation of governmental immunity. Many states have judicially abrogated the doctrine of governmental immunity, on the basis that this doctrine violates equal protection of the law. *Ayala v. Philadelphia Board of Public Education*, 305 A2d 877 (Sup. Ct. Pa. 1973), *Becker v. Beaudon*, 106 R.I. 562 A2d 896 (1970), *Haney v. City of Lexington*, 386 S.W. 2d 738 (Ky. 1964), *Hargrove*

v. *Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957), *Kitto v. Minot Part District*, 224 N.W.2d 795 (Sup. Ct. N.D. 1974), *Merrill v. City of Manchester*, 332 A2d 378 (Sup. Ct. N.M. 1974), *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill 2d 11, 163 N.E. 2d 89 (1959), *Muskopf v. Corning Hospital District*, 55 C.2d 211, 11 Cal. Rptr. 89 (1961), *Rice v. Clark County*, 382 P. 2d 605 (Nev. 1963), *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P. 2d 107 (1963), *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W. 2d 1 (1961).

That the principle that "The King can do no wrong" is totally contrary and repugnant to our concepts of justice in the twentieth century, goes without saying. Such a principle is totally inconsistent with the concepts of due process and equal protection of the law.

A decision by this Court, to abrogate the Doctrine of Governmental Immunity, would lay to rest, once and for all, a complex area of law, which is obviously an unfair concept and a violation of the equal protection of the law.

## II

Article I, Section 16 of the Ohio Constitution states that, "All Courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

In several of the states, the decision to abrogate the Doctrine of Governmental Immunity, was based, not only upon the equal protection clause of the particular state constitution and the 14th Amendment of the United States Constitution but also upon a clause in their respective Constitutions which parallel Article I, Sec. 16 of the Ohio Constitution. *Holytz v. City of Milwaukee*, 17 Wis.2d 26,

115 N.W.2d 618 (1962), *Kitto v. Minto Park District*, *supra*, *Williams v. City of Detroit*, *supra*.

Again, a decision by this Court, to abrogate the Doctrine of Governmental Immunity would lay to rest what is an unfair concept and a violation of Art. I, Sec. 16 of the Ohio Constitution.

## III

In addition to the above reasons for abrogating the Doctrine of Governmental Immunity, numerous courts have supplemented the rationale for their decisions in holding that the Doctrine is an anachronism without rational basis. *Campbell v. State of Indiana*, 284 N.E.2d 733 (Sup. Ct. Ind. 1972), *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29, 141 A2d 276 (1958), *Haney v. City of Lexington*, *supra*, *Kitto v. Minto Park District*, *supra*, *Molitor v. Kaneland Community Unit District No. 302*, *supra*, *Muskopf v. Corning Hospital District*, *supra*, *Rice v. Clark County*, *supra*, *Spanel v. Mounds View School District No. 621*, 118 N.W. 2d 795 (Minn. 1962), *Stone v. Arizona Highway Commission*, *supra*.

As was stated in the *Muskopf* case, *supra*, "the rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . ."

## CONCLUSION

Because this case squarely presents a serious issue of common interest to all the people of the State of Ohio, and because the decisions below are in such conflict with Article I, Sections 2 and 16 of the Ohio Constitution, and the 14th Amendment of the United States Constitution it is respectively submitted that the writ for which this petitioner prays be issued.

*In the alternative, petitioner respectfully requests that the case be remanded to the Supreme Court of Ohio for a hearing on the merits for the reason that there does exist substantial constitutional issues herein.*

Respectfully submitted,

JOHN J. GETGEY, JR.  
615 Provident Tower  
Cincinnati, Ohio 45202  
*Attorney for Petitioner*

#### CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Ohio were sent this 10th day of May, 1976, by regular U.S. Mail, or Air Mail, in accordance with Rule 33 of the Rules of Practice of the Supreme Court of the United States, to the following:

THOMAS A. LUEBBERS  
*City Solicitor*

TIMOTHY L. BONSCAREN  
*Assistant City Solicitor*

DONALD E. HARDEN  
*Special Council*  
Room 214—City Hall  
Cincinnati, Ohio 45202  
*Attorney for Defendants-  
Respondents*

# APPENDIX



A1

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO  
THE STATE OF OHIO,  
City of Columbus.

ROBERT L. WADE,

*Appellant,*

v.

WALTER HENKENBERNS *et al.*,

*Appellees.*

1976 TERM

To wit: February 13, 1976

No. 75-1118

APPEAL FROM THE COURT OF APPEALS  
FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this .... day of ..... 19...

..... Clerk

..... Deputy



A2

APPENDIX B

COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

No. C-74560

ROBERT L. WADE,

*Plaintiff-Appellant,*

v.

WALTER HENKENBERNS, MICHAEL CARNEY,

JOHN YORGAVIN, JOSEPH HOFFMAN,

and

THE CITY OF CINCINNATI,

*Defendants-Appellees.*

NOTICE OF APPEAL

Notice is hereby given that Robert L. Wade, plaintiff-appellant, hereby appeals to the Supreme Court of Ohio from the decision of the First District Court of Appeals entered in this action on the 27th day of October, 1975.

A3

This case involves a question of public and great general interest as well as a substantial constitutional question.

WHITE & GETGEY CO., L.P.A.

By: /s/ JOHN J. GETGEY, JR.

JOHN J. GETGEY, JR.

*Trial Attorney for Plaintiff-Appellant*

615 Provident Tower  
One East Fourth Street  
Cincinnati, Ohio 45202  
Phone: 513-241-3685

THOMAS A. LUEBBERS

*City Solicitor*

TIMOTHY L. BOUSCAREN

*Assistant City Solicitor*

DONALD E. HARDIN

*Special Counsel*

*Attorneys for Defendants-Appellees*

Room 214—City Hall  
Cincinnati, Ohio 45202

This is to certify that on the 25th day of November, 1975, a copy of the Notice of Appeal was sent by regular U. S. mail to the above attorneys for the defendants-appellees.

WHITE & GETGEY CO., L.P.A.

By: /s/ JOHN J. GETGEY, JR.

JOHN J. GETGEY, JR.

*Trial Attorney for Plaintiff-Appellant*

A4

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO  
THE STATE OF OHIO,  
City of Columbus.

ROBERT L. WADE,

*Appellant,*

v.

WALTER HENKENBERNS *et al.*,

*Appellees.*

1976 TERM

To wit: February 13, 1976

No. 75-1118

MOTION FOR AN ORDER DIRECTING THE COURT  
OF APPEALS FOR HAMILTON COUNTY  
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, \$20.00, paid by White & Getgey.

.....

I, Thomas L. Startzman, Clerk of the Supreme Court of  
Ohio, certify that the foregoing entry was correctly copied  
from the Journal of this Court.

Witness my hand and the seal of the Court  
this .... day of ..... 19...

..... Clerk

..... Deputy

A5

APPENDIX D

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

No. C-74560

ROBERT L. WADE,

*Plaintiff-Appellant,*

v.

WALTER HENKENBERNS, MICHAEL CARNEY,  
JOHN YORGOVAN, JOSEPH HOFFMANN  
and THE CITY OF CINCINNATI,

*Defendants-Appellees.*

DECISION

October 27, 1975

MESSRS. WHITE & GETGEY, JOHN J. GETGEY, JR. *of counsel*,  
615 Provident Tower, Cincinnati, Ohio 45202, *for*  
*Plaintiff-Appellant,*

MESSRS. THOMAS A. LUEBBERS, TIMOTHY L. BOUSCAREN  
and DONALD E. HARDIN, Room 214, City Hall, Cin-  
cinnati, Ohio 45202, *for Defendants-Appellees.*

PER CURIAM.

This cause came on to be heard upon the appeal, the  
transcript of the docket, journal entries and original papers  
from the Hamilton County Court of Common Pleas, tran-

script of the proceedings, a sole assignment of error, briefs and oral arguments of counsel.

Plaintiff-appellant, Robert L. Wade, hereinafter referred to only as appellant, commenced an action for personal injuries sustained by him while in custody of the Cincinnati Police Department. The complaint named certain individual police officers and the City of Cincinnati, hereinafter referred to as the City, as defendants. In the trial court the City prevailed on a motion to dismiss. Thereafter, the cases against the individual defendants were disposed of either by the trial court's rulings on motions or by jury verdict. None of the individual defendants was found to be liable to the appellant.

The sole assignment of error postulates prejudice in the court's granting of the City's motion to dismiss, thus challenging the doctrine of governmental immunity which the City, as a municipal corporation, enjoys.

The law of this state is well established (and counsel for appellant so concedes) that a municipal corporation is not liable for the torts of its policemen.

A municipality cannot under ordinary circumstances incur any liability by reason of the defaults of its police department or the acts of the personnel thereof. The creation and maintenance of a police department by a municipality are done in the exercise of its governmental functions, and the municipality is not, in the absence of statutory provision, liable in damages for injuries resulting from the negligence of such department, or any of its members. The performance of an act by an official of a municipal police department is not the performance of a ministerial act for which the municipality becomes liable under the maxim 'respondent superior' . . .

. . . . Nor is a municipality liable for torts committed by police officers in making arrests. . . . 39 O Jur 2d, § 435 MUNICIPAL CORPORATIONS.

Furthermore, the Ohio Supreme Court, as recently as July, 1972, has indicated a recognition of a continuing vitality of the concept of sovereign immunity. In *Krause, Admr., v. State* (1972), 31 Ohio St. 2d 132 the Court held:

The state of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly.

We are not unaware of the technical distinction between the "sovereign" immunity of the State of Ohio and the "governmental" immunity of its political subdivisions. However, it is manifest to us that the theory behind both concepts is identical and that the pronouncements in *Krause* are relevant and provide current guidelines as to the present status of the law in governmental immunity.

It follows that the assignment of error must be overruled. We affirm.

SHANNON, P. J. and KEEFE, J.

PALMER, J., CONCURRING:

Were we free to consider this matter as appellant would have us consider it, solely on its merits and without reference to *stare decisis* or, more particularly, without reference to the necessarily subordinate position of this Court to the Supreme Court of this State, I would be strongly persuaded by the cases, among many others of *Hicks v. New Mexico*, 44 U.S.L.W. (N.M. Sept. 26, 1975), *Ayala v. Philadelphia Board of Education*, 305 A. 2d 877 (Pa. 1973), and *Marusa v. District of Columbia*, 484 F. 2d 828 (D.C. Cir. 1973), and the concurring opinion of Justice Gibson in *Hack v. City of Salem*, 174 Ohio St. 383, 391 (1963) that the ancient doctrine of governmental immunity is, indeed, an "anachronism, without rational basis." *Id.* at 398. The public policy which once provided, or was



A8

said to provide, its fundament, now, it would seem to me, argues for its quiet extinction.

As my brothers quite properly hold, however, the issue is not one of first impression. Far from it, precedent in this State, and from the highest Court in this State, is admittedly well established contra to the position of appellant. As observed by Justice Corrigan in his concurring opinion in *Krause v. State*, supra, at pp. 148-9, quoting 21 C.J.S. COURTS § 197:

Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness. . . .

If the law of governmental immunity is destined to be modified, it is clear that it must be accomplished by the General Assembly or by the highest court in this State, and not in this forum. I therefore concur in the judgment of the majority herein.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

A9

APPENDIX E  
COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

No. A-725528

ROBERT L. WADE,

*Plaintiff,*

v.

WALTER HENKENBERNS

and

MICHAEL CARNEY

and

JOHN YORGOVAN

and

JOSEPH HOFFMANN

and

THE CITY OF CINCINNATI, OHIO,

*Defendants.*

JUDGMENT ENTRY

This action came on for trial before the Court and a duly impanelled jury on September 16, 18, 19, 20 and 23, 1974, at which time the issues were duly tried and the jury rendered its verdict on September 23, 1974.

In conformity with the verdict of the jury, IT IS ORDERED AND ADJUDGED that the plaintiff take



nothing; that the action be dismissed on the merits; and that defendant, Walter Henkenberns, the sole remaining defendant, recover of the plaintiff, Robert L. Wade, his costs of the action.

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/s/ TIMOTHY L. BOUSCAREN

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TIMOTHY L. BOUSCAREN  
*Assistant City Solicitor*

/s/ DONALD E. HARDIN

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DONALD E. HARDIN  
*Special Counsel*  
*Attorneys for Defendants*

/s/ JACK HEALY

---

WHITE & GETGEY CO., L.P.A.  
*Attorneys for Plaintiff*  
By: JACK HEALY

**APPENDIX F**  
**POSITION OF STATES<sup>1</sup>**  
**WITH REGARD TO**  
**THE DOCTRINE OF GOVERNMENTAL IMMUNITY**

<i>Judicially Abrogated</i>	<i>Statutorily Abrogated</i>	<i>Modified</i>	<i>Insurance- Waiver Theory</i>
Alaska	Hawaii	Connecticut	Georgia
Arizona	Iowa	South Carolina	Kansas
California	New York	Texas	Maine
Colorado	Oklahoma		Mississippi
Florida	Oregon		Missouri
Idaho	Utah		Montana
Illinois	Washington		North Carolina
Indiana			North Dakota
Kentucky			Ohio
Louisiana			Tennessee
Michigan			Vermont
Minnesota			Wyoming
Nebraska			
Nevada			
New Hampshire			
New Jersey			
Pennsylvania			
Rhode Island			
West Virginia			
Wisconsin			
District of Columbia			
New Mexico			
<i>Common Law</i>			
Alabama	Massachusetts		
Arkansas	South Dakota		
Delaware	Virginia		
Maryland			

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<sup>1</sup> This compilation is based on material presented in Restatement, Second, Torts § 895A at 12-20 (Tentative Draft, March 30, 1973, and is cited by the Pennsylvania Supreme Court in *Ayala v. Philadelphia Board of Public Education*, 305 A.2d 877, at 883 (1973); and also cited in *Hicks v. New Mexico*, 44 U.S.L.W. (N.M. Sept. 26, 1975. It has been updated to October 30, 1975).

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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1975

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NO. 75-1637

---

ROBERT L. WADE,

Petitioner,

vs.

WALTER HENKENBERNS,

MICHAEL CARNEY,

and

THE CITY OF CINCINNATI,

Respondents.

---

BRIEF FOR RESPONDENT IN OPPOSITION  
TO CERTIORARI

---

THOMAS A. LUEBBERS

City Solicitor

TIMOTHY L. BOUSCAREN

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Room 214, City Hall

Cincinnati, Ohio 45202

Attorneys for Respondents

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## TABLE OF CONTENTS

---

QUESTION PRESENTED .....	2
COUNTER-STATEMENT OF THE CASE .....	2
REASON FOR DENYING THE WRIT .....	3
CONCLUSION .....	6
APPENDIX .....	A-1

## II.

### TABLE OF CASES

	Page
Aldrich v. Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922) .....	4
Bell v. Cincinnati, 80 Ohio St. 1, 88 N.E. 128 (1909) ..	4
Hans v. Louisiana, 416 U.S. 232 (1890) .....	3
Krause v. State, 31 Ohio St. 2d 132, 285 N.E. 2d 736 (1972), appeal dismissed 409 U.S. 1052 ....	3, 4, 5
Nanna v. McArthur, 44 Ohio App. 2d 22 (1975) ..	4
Palumbo v. Industrial Commission, 140 Ohio St. 54, 42 N.E. 2d 766 (1942) .....	4
Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1916) .....	4
Reed v. Reed, 404 U.S. 71 (1971) .....	5
Scheuer v. Rhodes, 416 U.S. 232 (1974) .....	3
State ex rel. Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947) .....	4
Tigner v. Texas, 310 U.S. 141 (1940) .....	5
Western College v. City of Cleveland, 12 Ohio St. 375 (1861) .....	4
Williams v. Columbus, 33 Ohio St. 2d 75, 294 N.E. 2d 891 (1973) .....	4
Wolf v. Ohio State University Hospital, 170 Ohio St. 49, 162 N.E. 2d 475 (1959) .....	4

## III.

### AMENDMENTS, STATUTES AND MISCELLANEOUS AUTHORITY

	Page
United States Constitution, Eleventh Amendment ..	2, 6
United States Constitution, Fourteenth Amendment ..	5
Ohio Constitution, Article 1, Section 16 ....	2, 3, 4, 5
Ohio Revised Code, Section 2743.01 (A) and (B) ...	5
75 Opinions of the Attorney General 036 .....	5



IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1975

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NO. 75-1637  
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ROBERT L. WADE,  
Petitioner,  
vs.  
WALTER HENKENBERNS,  
MICHAEL CARNEY,  
and  
THE CITY OF CINCINNATI,  
Respondents.

-----  
**BRIEF FOR RESPONDENT IN OPPOSITION  
TO CERTIORARI**  
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Respondent, the City of Cincinnati, hereby opposes granting the writ of certiorari in the above-captioned matter.

The opinions below, the basis of this Court's jurisdiction, and several constitutional and statutory provisions involved are set out at pp. 2-3, A1, A5-A8 of the Petition. Additional constitutional and statutory provisions involved are reproduced in the Appendix to this Brief.

### QUESTION PRESENTED

WHETHER THE PETITIONER CAN RECOVER AGAINST THE CITY FOR NEGLIGENCE WHEN THE JURY DECIDED IN FAVOR OF THE INDIVIDUAL POLICE OFFICER DEFENDANT AND THE CITY IS FURTHER PROTECTED BY THE DOCTRINE OF GOVERNMENTAL IMMUNITY WHICH IS RECOGNIZED BY ARTICLE I, SECTION 16, OF THE OHIO CONSTITUTION AND SECURED BY THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

### COUNTER-STATEMENT OF THE CASE

Petitioner, Robert L. Wade, filed a complaint in the Court of Common Pleas, Hamilton County, Ohio, July 28, 1972, naming four police officers and the City of Cincinnati as defendants. Wade claimed that one of the officers had negligently projected a blunt instrument into his left eye, resulting in blindness in that eye.

The city filed an Answer and, thereafter, filed a Motion to Dismiss on the grounds that a municipal corporation cannot be held liable for injuries resulting from acts of members of its police department, even if negligent. The trial court granted the Motion to Dismiss. The case against the individual policeman was tried before a jury. The jury decided in favor of the individual officer, Walter Henkenberns, all other parties having been dismissed by stipulation or upon motion of defendants.

Thereafter, petitioner Wade filed a Notice of Appeal from the decision of the court granting the city's Motion to Dismiss. The decision of the jury on the negligence issue was not appealed. The Court of Appeals, First Ap-

pellate District of Ohio, affirmed the order of the trial court. Petitioner appealed to the Supreme Court of Ohio. The Supreme Court dismissed the appeal.

This cause is now before this Court on the Petition for Certiorari filed by Robert L. Wade.

### REASON FOR DENYING THE WRIT

**The Doctrine Of Governmental Immunity Stems From The Concept Of Sovereign Immunity Recognized By The Eleventh Amendment To The United States Constitution And Article I, Section 16, Of The Ohio Constitution. It Is Not In Conflict With The Constitutional Guarantee Of Equal Protection.**

The Eleventh Amendment of the Constitution reads:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced by one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

Unless the state waives this immunity, it cannot be sued. In *Hans v. Louisiana*, 416 U.S. 232 (1890), the amendment was construed to prohibit suit by a citizen against his own state. Accord: *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

Ohio recognizes the doctrine of sovereign immunity. The second sentence of Section 16, Article I, of the Ohio Constitution, not cited by Petitioner, reads:

"Suits may be brought against the state, in such courts and in such manner as may be provided by law." (Emphasis added.)

Section 16 is not self-executing; statutory consent is a prerequisite to suit. *Krause v. State*, 31 Ohio St. 2d 132, 285

N.E. 2d 736 (1972), appeal dismissed 409 U.S. 1052; *Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102 (1916); *Palumbo v. Industrial Commission*, 140 Ohio St. 54, 42 N.E. 2d 766 (1942); *State, ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E. 2d 82 (1947); *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49, 162 N.E. 2d 475 (1959).

Sovereign immunity under Article I, Section 16 extends to municipal corporations when acting in a governmental function. *Williams v. Columbus*, 33 Ohio St. 2d 75, 294 N.E. 2d 891 (1973); *Nanna v. McArthur*, 44 Ohio App. 2d 22 (1975). Thus, the law is well established in Ohio that a municipal corporation is not liable for the torts of its policemen. *Western College v. City of Cleveland*, 12 Ohio St. 375 (1861); *Bell v. Cincinnati*, 80 Ohio St. 1, 88 N.E. 128 (1909); *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922). See also *Williams v. Columbus*, 33 Ohio St. 2d 75, 294 N.E. 2d 891 (1973).

Under the Ohio Constitution, only the General Assembly has the authority to waive immunity. *Krause*, supra, considered this very issue when the court was asked to abolish the doctrine judicially. After tracing the history of the defense in Ohio, the court concluded:

"Although the doctrine of governmental immunity was originally judicially created, it is not now subject to judicial re-examination. When the people of Ohio, in 1912, adopted Section 16 of Article I as part of the organic law of this state, they foreclosed to this or any other court the authority to examine the 'soundness' or 'justice' of the concept of governmental immunity. The people of Ohio placed that policy decision in the hands of the General Assembly, and the merits or demerits of granting or withholding consent are to be debated and determined by that body alone. It is not within the province of the judiciary to make that de-

termination. Nor can we make that constitutional provision meaningless. The alternate remedy is by constitutional amendment."

The General Assembly enacted legislation to permit suit against the state in a special court of claims effective January 1, 1975. Chapter 2743, Ohio Revised Code. Significantly the statute specifically excludes municipal corporations from its coverage. Sections 2743.01 (A) and (B) Ohio Revised Code. Municipalities consequently do not lose their governmental immunity under the new legislation. Opinion of the Attorney General, 75 O.A.G. 036.

The doctrine of governmental immunity is not in conflict with equal protection of the law. Not only is it recognized as a valid concept in the constitutions of both the State of Ohio and the Federal Government, but it does not create impermissible classifications. The Ohio Supreme Court considered and rejected petitioner's argument in *Krause*, supra, pp. 145-146. The majority properly reasoned that Section 16 of Article I does not create any classifications; it bars all suits against the state absent enabling legislation. The fact that persons injured by non-governmental tort-feasors may have remedies not available to those who sue the state is not unconstitutional discrimination because equal protection permits distinctions based on accepted substantive differences. *Tigner v. Texas*, 310 U.S. 141, 149 (1940). Moreover, the Fourteenth Amendment does not prohibit states from treating different classes of people differently provided the distinctions are consistent with the legitimate goals of the legislation. *Reed v. Reed*, 404 U.S. 71, 75 (1971).

Petitioner cites decisions in other jurisdictions which abolish the defense of governmental immunity on the basis of conflict with equal protection. (Petitioner's Brief, pp. 5-6.) However, Ohio law prevents abrogation by Ohio



courts and the Eleventh Amendment prevents Supreme Court intervention.

### CONCLUSION

This case is not the appropriate vehicle for judicial abolition of the doctrine of governmental immunity. The sole issue raised by petitioner is whether the doctrine of governmental immunity shall continue to apply to municipal corporations charged with the commission of torts by their police officers. While petitioner's counsel challenges the public policy for the doctrine and pleads for its abolition, he does not otherwise question its application to the present action.

In this suit the jury held that the individual police officer charged with blinding petitioner in one eye was *not* negligent. If the petitioner cannot recover from the policeman, there is no basis for his recovery against the city. Consequently, the facts of this case are particularly unattractive for the decision petitioner seeks. The Court should deny the writ.

Respectfully submitted,

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### APPENDIX

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#### CONSTITUTION OF THE UNITED STATES

##### AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

#### CONSTITUTION OF THE STATE OF OHIO

##### Article I, Section 16

##### 16. Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (Adopted Sept. 3, 1912).

#### COURT OF CLAIMS

##### GENERAL PROVISIONS

##### 2743.01 Definitions

As used in Chapter 2743. of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.



(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.